

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

Commission Members:

| | |
|--|---|
| Jane Wallis Gumble | (Absent) Task Force Chair, Director, DHCD |
| Fred Habib | Facilitator, Non-Voting member, Deputy Director, DHCD |
| Mark Bobrowski | (Absent) Municipal Consultant, Professor, New England School of Law |
| Senator Harriette Chandler | Senate Chair, HUD Committee |
| Jack Clarke | Director of Advocacy, Massachusetts Audubon Society |
| Howard Cohen | Board Member, Citizens Housing & Planning Association |
| Representative Michael Coppola | Massachusetts House of Representatives |
| Marc Draisen | Executive Director, Metropolitan Area Planning Council |
| Steve Dubuque | President, Massachusetts Non-Profit Housing Association |
| Representative Robert Fennell | (Absent) Vice Chair, HUD Committee |
| <i>Represented by Anna Waclawiczek</i> | |
| Thomas Gleason | Executive Director, MassHousing |
| Bennet Heart | Attorney, Conservation Law Foundation |
| Representative Kevin Honan | House Chair, HUD Committee |
| Michael Jaillet | MMA Housing Subcommittee |
| Al Lima | Planning Director, City of Marlborough |
| Bill McLaughlin | President, Rental Housing Association of the GBREB |
| Kathleen O'Donnell | Attorney, Kopelman & Paige |
| Gwen Pelletier | Board Member, Massachusetts Association of CDC's |
| Mayor Sharon Pollard | City of Methuen |
| Jeff Rhuda | Homebuilders Association of Massachusetts |
| Representative Harriett Stanley | Massachusetts House of Representatives |
| Senator Bruce Tarr | HUD Committee |
| Senator Susan Tucker | Massachusetts Senate |
| Senator Dianne Wilkerson | Massachusetts Senate |
| Clark Ziegler | Executive Director, Massachusetts Housing Partnership |

Attendees (as documented on the sign-in sheet):

| | |
|---------------------|----------------------------------|
| Judith Alland | MAPC |
| Art Bergeron | |
| Roger Blood | Brookline Housing Advisory Board |
| Karen Bresnahan | DHCD |
| Joy Conway | Greater Boston Real Estate Board |
| Marilyn Contreas | DHCD |
| Ben Fierro | Lynch and Fierro LLP |
| Tony Fracasso | MassDevelopment |
| Meredith Gallagher | Rierner and Braunstein |
| Anne Marie Gaertner | DHCD |
| Kurt Gaertner | EOEA |
| Aaron Gornstein | CHAPA |
| Jacques Morin | Bayberry Building |
| Kristen Olsen | DHCD |
| Maureen O'Rourke | DHCD |
| Sotir Papalilo | Westwood Associates |
| Kate Racer | DHCD |

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

Attendees Continued

| | |
|-------------------|--------------------------------------|
| Ted Regnante, Esq | Regnante, Stereo & Osborne |
| Bill Reyelt | DHCD |
| Bob Ruzzo | MassHousing |
| Kevin Sanginario | Office of Senator Harriette Chandler |
| Melissa Santucci | Town of Burlington |
| Russ Tanner | Rising Tide Development |
| Sarah B. Young | DHCD |
| Juanita Zerda | DHCD |

Materials Distributed:

- Timeline
- Comments from Attorney Kathleen O'Donnell on the 4/28/03 Draft Minutes
- Comments from Gary Bohan
- Citizen Planner Training Collaborative Spring 2003 Course Brochure
- Smart Growth and 40B; Presented by Bennet Heart
- Proposed 40B Smart Growth Criteria; Submitted by Bennet Heart
- A Developers Perspective to Chapter 40B, An Alternative Option; Submitted by Sortir Papalilo

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

Introductory Remarks:

Fred Habib, Task Force Facilitator and Deputy Director for DHCD brought the meeting to order at 2:00 PM, and asked those in attendance to introduce themselves. He then distributed a timeline for meeting the May 30th deadline.

Timeline:

Mr. Habib noted that today was the final day to go over possible solutions, and that DHCD will email the language for the solutions to Task Force members on Friday May 16th. He asked members to review the proposed language prior to the May 20th meeting and be prepared to discuss any unresolved issues. He added that on May 23rd DHCD will distribute a draft copy of the report, and asked Task Force members to be prepared to discuss it at the May 27th meeting. He noted that any adjustments resulting from the May 27th meeting would be incorporated into the final report, which will be presented to the Governor on Friday, May 30th.

Mr. Habib noted that Anne Marie Gaertner, Senior Policy Advisor for DHCD, would be coordinating much of the language. He asked Task Force members to be aware that they will receive the draft report on the Friday before the long weekend. He explained that while this may not be ideal, it was necessary to meet the May 30th deadline.

Adoption of April 28, 2003 Minutes:

He then noted that copies of the changes to April 28, 2003 Draft Minutes requested by Attorney Kathleen O'Donnell had been provided to Task Force members.

Mr. Habib then noted that since the Draft Minutes of the May 5, 2003 meeting had just been distributed on Friday, the Task Force would vote on their adoption next week. He added that there was some unfinished business on the Draft Minutes of the April 28, 2002 meeting. He noted that Attorney Kathleen O'Donnell had proposed a change to page 10 of the minutes, and asked Task Force members to refer to their packet for clarification. There were no additional requested changes, and all Task Force members present voted to adopt the April 28th Minutes with Attorney Kathleen O'Donnell's requested change.

Smart Growth Presentation, Bennet Heart:

Bennet Heart, Attorney for the Conservation Law Foundation, noted that it was a tall order to increase housing growth while stopping sprawl. He then explained that sprawl is defined as low-density, auto-oriented, single use development, typically in outlying areas. He added that land in Massachusetts is developed at a rate of four times population growth, and that traffic delay hours had increased by 50% in the Metro Boston area. He also noted that the inner core of Metro Boston area was growing much slower than the southwestern area of Metro Boston.

Mr. Heart explained that sprawl is a serious problem in Massachusetts with economic, environmental, social and health costs. He noted that with smart growth, hundreds of millions of dollars could be saved in infrastructure costs. He explained that smart growth is the opposite of sprawl and tends to be compact, higher density, mixed use, pedestrian friendly and conducive to transit. He also noted that smart growth means making good use of existing developed areas and building in compact, mixed-use form in undeveloped areas.

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

Mr. Heart noted that the state has the unique ability to check sprawl through its capital spending and laws. He proposed the following four options for incorporating smart growth with 40B:

1. Add to project eligibility requirements
2. Add to planned production requirements
3. Count units that meet smart growth criteria more favorably- similar to the current counting policy for rental and ownership units.
4. Housing credit approach. Permit town to purchase housing credits for up to half of 10% obligation, if the development met smart growth criteria. Towns negotiate. DHCD facilitate/approve.

Mr. Heart also noted that the objective should be to get towns to plan and zone for significant housing in a way that incorporates smart growth. He then highlighted the following three ways of achieving this objective:

1. State determination of regional housing needs. Requirement that towns develop plans to meet those needs and implement-, as is the case in New Jersey and California. There would be a requirement that plans incorporate smart growth principals, and there would be financial incentives for developing and implementing these plans.
2. State plan, comprehensive planning at local level that satisfies state planning goals - as is the case in Oregon.
3. State capital spending and incentives approach: Begin state policy not to subsidize sprawl, state will only fund infrastructure expansion projects in priority funding areas- as is the case in Maryland. The state and municipalities would designate growth areas pursuant to state smart growth criteria. The state would certify these areas, and where state certification is received, towns could require that all 40Bs go in designated growth areas.

Mr. Heart also proposed that additional local aid for towns that produce affordable housing be contingent upon meeting smart growth criteria. He also expressed his support for the inclusionary zoning proposed in the 40A reform bill, housing zones, and historic structure rehab state tax credit of 30%.

Mr. Heart distributed copies of his Proposed Smart Growth Criteria, which outlined how to incorporate smart growth with 40B.

Regional Approach, Jack Clarke:

Jack Clarke, Director of Advocacy for the Massachusetts Audubon Society, noted that he had developed a proposal for a regional approach to developing affordable housing. He explained that his regional approach contained the following three components:

1. Affordable housing regions, which would be established by DHCD would consist of clusters of neighboring communities.
2. Affordable housing regional auction, which would allow municipalities that exceed 10% on their Subsidized Housing Inventory to bank the excess and sell the credit to communities in their region that have not met the 10% goal.
3. Affordable housing plans, which would address meeting the 10% target via local and regional development. The plans would have to be approved by DHCD, and once the plan is approved the town could participate in their region. Towns

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

would be required to update their plans every 5 years and increase their Subsidized Housing Inventory by 1% annually.

Mr. Clarke explained that the incentives for communities in this regional approach would be that they could get a year off if they increase their percentage by 1% annually, and that once a region reaches 10%, all communities in that region would be exempt from comprehensive permits. He added that fees could be used to offset the costs associated with new housing, tax incentives could be provided for long-term affordability, and DHCD could target its funds to these communities.

Mr. Habib asked Mr. Clarke if it was accurate to summarize that his regional approach would be a major overhaul to the way 40B is used now by tying regional planning and production, and allowing the buying and selling of credits.

Mr. Clarke agreed.

Steve Dubuque, President, Massachusetts Non-Profit Housing Association, noted that smart growth would be frustrated if we don't look at how we raise income in our communities and how we distribute it. He noted the need to ensure that wealthy communities would not be able to exclude themselves from affordable housing requirements. He also noted the need to define 'region' under Mr. Clarke's proposal, and asked if a region would include contiguous communities. He also asked about how this would work in coastal communities. He expressed concern that gated communities would be able to continue their isolation. He noted that in his view 10% is a minimum, not maximum. He noted that he was concerned that by using affordable housing as the example of trying to reach regional goals, it would hinder the development of affordable housing. He added that the much bigger issue in some communities would be sharing residential and industrial growth.

Mr. Clarke noted his belief that there will be a major overhaul in how we build in Massachusetts, in how local aid is distributed to municipalities, and how the Commonwealth develops commercial space. He noted that it makes sense to identify areas where we want to build, and areas where we don't want to build.

Howard Cohen, Board member of CHAPA, noted that some principals of smart growth, such as density, are very consistent with 40B. He added that 40B is perhaps the smartest growth going on in Massachusetts right now. He explained that since smart growth focuses on sites with greater visibility such as town centers, placing the entire burden of smart growth on 40B could extinguish growth altogether. He then suggested that DHCD could build smart growth criteria into the planned production component of 40B. He noted that in his experience, some of the most resistance from communities on 40B projects have been on sites in town centers, where the development met all the smart growth criteria.

Mr. Heart noted that there are two ways to integrate smart growth with planned production; require all planned production to be smart growth or require the production of fewer units if they are smart growth.

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

Attorney Kathleen O'Donnell, of Kopelman & Paige, noted that she supported time off for planned production that incorporated smart growth. She then suggested that when the subsidizing agency is determining the feasibility of a project, it should need to consider whether the project met smart growth criteria.

Mr. Habib asked if the subsidizing agency would be able to deny a project eligibility letter if the project was not smart growth.

Attorney Kathleen O'Donnell responded that it wouldn't be reasonable to deny project eligibility if smart growth criteria were not met.

Al Lima, Planning Director for the City of Marlborough, noted that he agreed with principals of smart growth, but that he was concerned that incorporating smart growth requirements in the determination of project eligibility would make it more difficult to build under 40B.

Mr. Heart noted that it was not his intention to reduce housing production, but that since 40B is a state program it should incorporate smart growth. He noted that not all the criteria of smart growth would need to be met in order to build under 40B.

Mr. Habib noted that under Mr. Heart's proposal a project would need to receive a threshold number of smart growth points in order to receive a project eligibility letter.

Jeff Rhuda, of the Homebuilders Association of Massachusetts, noted that he loved smart growth concepts, but that he questioned the reasoning behind applying smart growth restrictions on 40B, which overrides local zoning, and not all construction. He explained that requiring the satisfaction of smart growth criteria for 40B, would mean that a site far away from town center couldn't be built under 40B, but would be able to be built via conventional zoning.

Mr. Heart noted that the key difference between 40B and local zoning is that 40B is a state program.

Mr. Rhuda responded that 40A is the Zoning Act.

Mr. Dubuque noted that it was not uncommon for communities to share infrastructure resources. He suggested allowing communities to do regional plans for 40B if they are also doing other regional activities such as sharing sewer and water resources. He noted that he was suspicious of the idea of selling credits. He then noted that since at the last meeting Doug Foy had said he didn't want to treat children in Massachusetts like pollutant, we shouldn't treat those in affordable housing like pollutants.

Tom Gleason, Executive Director of MassHousing, noted that the issue of smart growth in relation to 40B has potential to be the big issue that comes out of the task force. He noted that he was concerned about the process of adding to site approval letters when multiple agencies are issuing them. He noted that DHCD would need to step up and set the rules for site approval letters. He explained that his major concern is with how this would be implemented, and if an unintended consequence would be that housing production would be more expensive and more dense. He explained that land that is

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

closer to infrastructure is more expensive and in order to compensate for the additional costs of this land, you would either need to build more houses on the site or receive a greater subsidy. He noted, that you would end up with more houses.

Mr. McLaughlin noted that it wouldn't be a bad thing to build more houses on that desirable housing site. He explained that when you build in the middle of everything, there is great demand and market acceptance, which means that the market rents can be a bit higher to compensate for the affordable units. He also noted that in general, housing built in center of a community is met with most resistance, and that it is easier to build on the outskirts of a community near the border of neighboring communities.

Mr. Gleason noted that if a community identified land as appropriate for housing production, and stepped forward to get it built in an expedited manner, then that would be something that could really work. He noted the need to tie in the other issues the task force has discussed.

Senator Bruce Tarr noted that he would require that the land be zoned in coordination with a community's plan. He noted that it seems that if housing is built near transportation it is meeting regional need because accessible and there would be a regional benefit. He also noted that if housing is not built near transportation and is not accessible, you haven't addressed a regional need; you've created an outpost. He added that though this could be a good framework, he doesn't want this to prevent housing.

Senator Dianne Wilkerson asked Mr. Clarke if these regions are the same as the regions the governor has talked about for educational aid.

Mr. Clarke responded that the idea was that these regions would be a small group of contiguous municipalities, so no they would not be the same. He added that the region would have to be established.

Senator Dianne Wilkerson asked what the basis was for the concept of being able to buy and sell credits, and how it was connected with the goal of producing housing. She noted that she was concerned that this would exacerbate the problem that not everyone is sharing the responsibility/burden equally. She noted that under this regional approach only some suburban communities would have to deal with 40B and others would not.

Mr. Clarke noted that the 351 cities and towns in Massachusetts often share water and sewer, and that he was simply asking why not share affordable housing credits. He noted that after 30 years only about 30 communities have reached 10%, and that Massachusetts needs to do better than that.

Senator Dianne Wilkerson noted that she would expect that the notion of tying housing development with transportation development would apply to existing transportation development. She added that under this scenario, communities wouldn't want more transportation because it would bring in more housing. She noted this would contribute to the unequal distribution of affordable housing.

Mr. Clarke noted that he believed Senator Dianne Wilkerson's concerns with equity were valid. He explained that he was looking to change 40B to get more housing built in locations that make sense. He added that some towns don't want new families coming to

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

town with kids due to the educational cost. He explained that the money that is transferred between communities for housing credits could be used to compensate for these additional costs.

Mr. Habib noted that there were four ideas related to smart growth on the table; 1) inclusion of a scoring threshold for smart growth in project eligibility letters, 2) incorporating smart growth into planned production requirements, 3) allowing urban areas to have denser development under 40B and suburban areas to have less dense development to get to smart growth principals (currently under discussion at DHCD) and 4) the discussion of a regional approach.

Senator Bruce Tarr noted that in terms of appropriate density, the answer could be to define it as a certain percentage over the allowable density in town. He also expressed his support for a framework of points, and suggested that additional points be granted if the proposed production was consistent with regional and local plans.

Mr. Dubuque noted that the point system was familiar, since state agencies often use point systems for funding. He added that he supported making local plans consistent with regional plans, and that he believed communities should be able to look at where it is best to develop housing and industry.

Mr. Ziegler noted that there seems to be some consensus on the idea of incorporating smart growth with planned production. He cautioned that incorporating smart growth criteria into the site approval process would be problematic, because not every project can be an ideal, award-winning project. He was concerned that incorporating smart growth criteria in the site approval process would prevent development. He added that the threshold should be if the project is reasonable and feasible.

Mr. Dubuque asked if there was no transportation in rural areas, would that mean that they would not have to build affordable housing.

Senator Harriette Chandler asked if a regional approach could be used as an option for communities, but not a requirement.

Mr. Draisen noted that the definition of region would be significant, and noted that regional plans may not be useful in assessing individual community needs. He suggested by allowing communities to develop individual plans to achieve housing goals consistent with their regional plan, it would give back some element of local control. He also noted that he was concerned about how community performance would be measured, and how achievement of 10% would be measured. He asked whether it would be measured for individual communities or for the region as a whole.

Mr. Cohen noted that this is such a divisive issue, and there are really good things about increasing diversity within communities. He noted that he thought this regional approach would see very little gain, and that he didn't think there would be that many buyers and sellers. He added that local planning was not that strong.

Attorney Kathleen O'Donnell suggested looking at this as a counting matter. She suggested that if towns have a project that they are working together on jointly, they

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

could share the benefit of credit for the units. For example, if a community that does not have water but has a site works with a neighboring community that has water, and the units are built in one town, and the water comes from the other town, the towns could share the credit.

Representative Harriett Stanley asked how this could be divisive if 351 communities are competing to get to 10%.

Mr. Habib noted that there seems to be consensus for incentives for smart growth via planned production and by allowing the state the flexibility to count units that are done via joint efforts accordingly.

Representative Kevin Honan suggested using a pilot project to test how the transferring of funds would work.

Representative Harriett Stanley noted that it wouldn't have to be a monetary transfer, that communities do other things such as allowing children into their school system.

Senator Bruce Tarr noted that the determining factor should be whether the housing couldn't have been built without joint cooperation.

Mr. Jaillet noted that this would only be for housing built going forward, and the communities would have to agree on how to share credit.

Mr. Dubuque noted that this is real issue, and cited an example of a community expanding its sewer/water line to increase the water pressure needed for housing in neighboring community.

Mr. Draisen suggested that the Task Force consider injecting smart growth in planned production requirements, some sort of regionalism, and in the notion of trading credits (as a pilot).

Mr. Heart noted that the state has the opportunity to guide production towards smart growth, and that right way to do that is to go beyond the planned production mechanism since it is unknown how robust the planned production vehicle will be. He noted that he believed it was appropriate to have land use requirements in a state program, and asked Task Force members to look at the handout that he had distributed for details of this proposal.

Mr. Habib suggested that Task Force members consider the three tracks, and revisit them at the next meeting.

Community Preservation Act (CPA)

- *Support increasing the minimum percentage of funds to be used for affordable housing*
- *Support changing the CPA to allow for cities and towns to set aside a pot of money to purchase units when they become available:*
- *Support allowing for the pooling of CPA funds to be used for affordable housing:*

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

Mr. Clarke noted that there are three components to the CPA, affordable housing, open space, and historic preservation. He added that communities are already allowed to set aside a pot of money to purchase units when they become available.

Attorney Kathleen O'Donnell noted that communities have to designate the project for which they are spending the money, which means they have to go to town meeting for approval. She explained that towns want to be able to set money aside for purchase of housing when it becomes available without having to go to town meeting to use the funds, and that currently the Dept. of Revenue doesn't allow this.

Mr. Draisen noted that it is a bizarre situation for towns to raise this money, and to be required that the small amount they raise be spent each year. He suggested allowing communities to pool their money for affordable housing.

Attorney Kathleen O'Donnell noted that if the statute were changed to require more funds to be used for affordable housing, the changes would not apply to the communities that have already adopted CPA.

Mr. Lima asked if it was possible to transfer CPA money to a non-profit and allow them to purchase the units when they become available.

Gwen Pelletier, Board Member of the Massachusetts Association of CDC's, noted that the town of Chatham is trying it.

Attorney Kathleen O'Donnell noted that she has recommended that towns buy affordable housing restrictions, not the actual units. She explained that this allows towns to get the price cap without having to spend as much money as they would if they purchased the unit.

Mr. Habib noted that there was no consensus on the proposal to increase the minimum percentage of CPA funds to be spent on affordable housing.

Senator Harriette Chandler asked if it was true that more communities were using CPA funds for open space.

Attorney Kathleen O'Donnell noted that communities have been finding that open space is expensive, and that there is a requirement that a certain percentage of CPA funds be spent on housing.

Mr. Habib noted that there was consensus on the proposal to allow communities to set aside a pot of money to purchase units when they become available. He also noted that there was consensus that cities and towns are already allowed to pool CPA funds for affordable housing.

Housing Appeals Committee (HAC)

- *Allow for constructive denials to be heard by the HAC*
- *Clarify who is responsible to pay for consultant fees*
- *Address capacity issues at the HAC*
- *Allow for abutter appeals to be heard at the HAC, not the Superior Court*

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

- *Place burden of proof on the applicant when it comes to requesting waivers*

Mr. Habib noted that the capacity issue at the HAC is demonstrated by the backlog of cases, and noted that either more funding will need to be provided to HAC for additional staff, or some procedural issues will need to be addressed.

Representative Michael Coppola noted that he believed the HAC should be eliminated, since it is just another layer of bureaucracy. He noted that history has shown that it takes quite some time to get an HAC decision, and that an increasing number of decisions are going from HAC to court. He added that there is a clearer way of doing business in the court system than at the HAC. He added that the HAC would need a significant increase in resources, since it currently takes several months to get a hearing. He added that and if the hearing is continued at the HAC it is not continued the following day as it is in the court system. He also noted that by going straight to court, the decision is an actual legal decision.

Ms. Pelletier noted her experience has not been consistent with Representative Coppola's statements. She noted that she has gone through the HAC and then to Superior court, and that HAC decision helped resolve the case out of court.

Mr. McLaughlin noted that the costs associated with delays kill good projects. He noted that the HAC is backlogged right now, and they probably need additional staffing. He noted that he would personally be willing to pay additional fees to get that staffing. He also noted that the HAC has made a number of precedent setting decisions, which should speed things along. He suggested that the Task Force recommend a comprehensive review of the HAC, and that DHCD could take on this task after the Task Force submits its report. He added that if there is a dual filing of appeals, the superior court does not review the case until an HAC decision is issued. He added that if the Governor wants to double housing starts, the good housing proposals before the HAC would need to be resolved and pushed along.

Representative Michael Coppola noted that there is no question that the HAC is a big part of the problem. He noted the need to address the issue of time, and noted that even if the time it takes to get an HAC decision is cut in half, there is still the possibility of going to court afterward. He suggested that by eliminating the HAC, you would skip the initial step.

Attorney Kathleen O'Donnell noted that the issue of time at HAC is that it is expensive for both the developer and the community. She noted that when 40B started, most of the projects were done with state funding and the parties were familiar with the administrative procedures. She explained that now that private developers are doing most of the projects it would make more sense to go to court since developers and towns have more experience in court. She added that right now it can take 1 ½ years to find out if the jurisdictional requirements are met. She also noted the significance of the 'urban legend' of HAC favoring developers, a legend that has been supported by the data presented to the Task Force that showed 84% of HAC decisions for the developer. She also noted that it was awkward that not all the Committee members are present during the hearings. She suggested eliminating the HAC and routing everything to superior court.

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

Mr. Habib noted that one method would be to spend more on staffing and establish procedural reform at the HAC.

Mayor Sharon Pollard noted that there is no money to spend on the problem. She noted that the HAC has served its purpose, and it has bad reputation with communities. She noted that she would prefer the creation of incentives for negotiation, and if those fail then the appeal should go to court.

Mr. Habib noted that the money would come from increased fees from developers.

Mr. Rhuda asked those who were in favor of eliminating the HAC, to find a bad project that was approved by the HAC and was actually built. He noted that the perception with communities is that HAC enforces the law, and it gives communities the answer they don't want to hear, which is that they have to build affordable housing. He then noted that moving appeals from the HAC to court would make things worse. He noted that the courts continue hearings, but it is a matter of years not days. He noted that if the HAC staffing issue were addressed, it would not take long to receive a decision. He then asked how many HAC decisions have been appealed to superior court.

Mayor Pollard noted that municipalities don't have the money to pursue these cases for 3-4 years. She added that she was aware that most people in the Task Force are pro-housing, but somewhere along the way communities need to have a voice. She noted the need for a level playing field, and the need to do affordable housing in a way that is fair.

Senator Harriette Chandler noted that communities look at the HAC with absolute fear. She noted that the perception is that they can either approve the project or developer will go straight to the HAC. She also noted that communities are afraid to negotiate because they are not confident in their knowledge of their rights.

Mr. Ziegler noted that MHP has been providing technical assistance to towns reviewing comprehensive permit applications, and that it has been very successful.

Senator Susan Tucker suggested giving the HAC the power to alleviate the costs of development. She also asked if the court system has the capacity to take on these cases.

Mr. Draisen noted that much of the negotiation that occurs at the HAC should have occurred much earlier in the process. He noted that he was concerned about attributing problems with the statute to the HAC. He added that the HAC should be more transparent, and that the Hingham decision that Mr. Bobrowski discussed at the previous meeting shouldn't have been so secretive. He suggested that when the HAC makes decisions that impact communities, they should be made accessible to communities. He then noted that the wealth of wisdom developed via experience at the HAC would be lost if it were eliminated and appeals were transferred to courts. He added that the HAC is applying a strong affordable housing law.

Senator Dianne Wilkerson noted that if anyone thinks that having appeals go straight to court will take less time than having the appeals go to the HAC and then possibly appealed to superior court, they should think again. She noted the recent court staffing cuts and the fact that court decisions can also be appealed. She explained that the real

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

answer is leveling the playing field earlier in the process. She noted the need to make the precedents set by the HAC decisions more available to communities. She also noted the need to shorten the process, and suggested having an initial mediation. She also noted that a backlog of 5,000 units was unacceptable, and suggested reviewing the process of financing the resources for HAC. She added that the Task Force shouldn't be discussing the elimination of the HAC.

Mr. Cohen noted that the Task Force is making a lot of changes that will improve the process. He explained that getting a decision locally is extremely important to developers, because being in litigation does not put food on their table. He noted that if you look at the data, you would see that a substantial amount of decisions are made locally. He added that there are some communities that knowingly deny permits and just go to the HAC as matter of civil disobedience. He explained that often you will know the outcome of an appeal based on precedent. He asked if the HAC had made any bad decisions that were inconsistent with law.

Attorney Kathleen O'Donnell noted that they had.

Mr. Cohen suggested talking about those decisions, and putting a penalty on the loser of the outcome of appeals, including abutters.

Mr. McLaughlin noted that even though the defendant includes the town, the town counsel is not at superior court with developer. He added that the developer spends a great deal more at superior court than the town.

Mr. Gleason noted that the Task Force has the opportunity to step outside and embrace changes that need to be made to the HAC. He noted that this would take more money and more staff, and recommended providing the fee income that will allow the HAC to grow and expand in response to the market demand. He explained that the HAC shouldn't approve everything, but they should be able to review the cases. He also suggested moving abutter appeals to the HAC, which had been a recommendation that came out of Barriers Commission report 1 ½ years ago. He noted that this was probably the strongest issue in process for him.

Mr. Dubuque noted that a mediation program had been developed in the court system to alleviate their caseload. He noted that mediation provided an opportunity to discuss the issues in front of knowledgeable individuals. He explained that he would prefer to be in front of the HAC because they are knowledgeable. He added that often when you go to the HAC with an appeal, you get into a discussion that leads to negotiation, which doesn't always happen during public meeting.

Attorney Kathleen O'Donnell noted that part of problem is the public meeting law. She noted that she was aware that the HAC supports mediation, but that the problem was that by the time you get to the HAC its been 1 ½ years, and people are already set in their positions. She noted that if the Task Force works on the front-end of the process, hopefully fewer cases would have to go to HAC.

Mr. Ziegler agreed that the open meeting law has been a problem lately. He explained that while everyone seems to agree that meetings in private between ZBA members,

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

planning board members and developers prove useful for negotiations, they have come under fire.

Mr. Dubuque noted that a ZBA appoint individuals to negotiate a compromise in private, which is presented to the ZBA at a public hearing. The ZBA can then vote on the compromise at the public hearing.

Mr. Cohen noted that the concerns arise when the individuals appointed to negotiate a compromise in private are public officials. He then noted that this could be fixed.

Senator Harriette Chandler noted that once the parties are at the HAC its too late, they already have their backs against the wall.

Representative Harriett Stanley suggested that the changes the Task Force was proposing for the beginning of the process would help.

Mr. Habib agreed with Representative Stanley and stated that the Task Force's proposals to change the beginning of the process were very strong.

Mr. Jaillet noted that he supported moving abutter appeals to HAC. He also noted the need to clarify that there can be executive sessions for negotiation out of public eye.

Attorney Kathleen O'Donnell noted the need to speed-up the process at the HAC.

Mr. Habib noted that there was no consensus for the elimination of the HAC. He noted that there was consensus on the need for a more expedited process at the HAC via increased fees for more staff and for mediation early in the process before going to the HAC. He then suggested considering a review of the procedures at the HAC to see if reforms could be made to expedite the process.

Werner Lohe, Chairman of the HAC, noted that in 1990 an advisory committee of about 12 people reviewed the HAC procedures with a focus on some very technical issues. He noted that the advisory committee incorporated decisions from case law into the regulations, while at the same time reducing the regulations by approximately 20%.

Mr. Habib noted that it was ironic that the majority of cases that go to the HAC are mediated, but the long and painful process leaves participants with a negative feeling.

Mr. Lima noted that the biggest club that municipalities have under 40B is the time it takes to get a decision at the HAC. He then suggested requiring municipalities and developers to try mediation prior to going to the HAC.

Mr. McLaughlin suggested that mediation should be optional and binding. He noted that any other way would just add another layer to the process.

Senator Dianne Wilkerson noted that though she recognized the need to review the process, if the Task Force is successful with everything else discussed thus far, the number of cases that go to the HAC would be reduced. She expressed concern that incentivizing mediation would add another layer. She noted that in some cases

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MAY 12, 2003 MEETING

communities need the HAC to catch the blame. She suggested incentivizing mediation without cutting off the opportunity to go to the HAC.

Mr. Habib noted that this might be way to go.

Mr. Jaillet noted that though he supported mediation, he wouldn't want it to be binding. He explained that once parties get into mediation they could reach a compromise, because they haven't hardened their positions yet. He added that this would mean that the HAC would only have to review cases that couldn't reach agreement through mediation.

Representative Michael Coppola noted his opposition to fees/penalties for losers.

Mr. Heart asked who would pay for the mediators

Mr. Ziegler noted that MHP pays for consultants to work with towns on local decisions.

Mr. Heart asked how the HAC facilitates mediation.

Mr. Lohe noted that the HAC refers cases to the Massachusetts Office of Dispute Resolution (MODR) for mediation services. He explained that for nearly 15 years, the state has paid for case evaluation and other initial administrative costs of mediation, and the HAC has already proposed that that should be done from the Committee's fees. He added that the parties themselves pay the actual cost of the mediator, which is less expensive than paying attorney fees.

Mr. Habib noted that DHCD would draft some language on incorporating mediation with the HAC, as well as a group to review the HAC procedures.

Mr. Habib noted that the next two meetings are the last meetings. He noted that the Task Force would address some of the more controversial issues such as counting, density, and smart growth at the next meeting. He also noted that due to the tight timeframe, he would keep everyone's comments short at next meeting. He warned that the second meeting might have to go over the scheduled 2½ hours to get everything done.